

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SELLMAR G. HOWELL)	
Claimant)	
VS.)	
)	Docket Nos. 222,949 & 222,950
SUNSHINE BISCUITS, INC.)	
Respondent)	
AND)	
)	
CONTINENTAL CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier appeal from the July 17, 1997, preliminary hearing Order and the Amended Order dated July 28, 1997, both entered by Administrative Law Judge Steven J. Howard.

ISSUES

Respondent initially filed for review of the preliminary hearing Order dated July 17, 1997, which bears only Docket No. 222,949. An Amended Order was entered by the Administrative Law Judge on July 28, 1997. Respondent's Application for Review by Workers Compensation Board lists the following issues:

- (1) In docket number 222,949, whether the claimant suffered any accidental injury to his cervical spine.
- (2) In docket number 222,949, whether any personal injury by accident to the claimant's cervical spine arose out of and in the course of the claimant's employment with the respondent.

(3) In docket numbers 222,949 and 222,950, whether the Administrative Law Judge exceeded his jurisdiction in entering the Amended Order dated July 28, 1997 and, specifically, whether the Administrative Law Judge exceeded his jurisdiction in adding docket number 222,950 to the Amended Order when the original Order only set forth docket number 222,949.

(4) In docket numbers 222,949 and 222,950, whether the original Order of the Administrative Law Judge and the Amended Order of the Administrative Law Judge should be vacated and remanded because they do not specify the findings upon which the Administrative Law Judge granted relief to the claimant.

(5) In docket number 222,950, whether the claimant suffered personal injury by accident.

(6) In docket number 222,950, whether any personal injury by accident sustained by the claimant arose out of and in the course of her employment with the respondent.

(7) In docket number 222,950, whether the claimant provided timely notice to the respondent.

In the brief of respondent and its insurance carrier the issues are described as follows:

- A. Whether the claimant sustained accidental injury to her neck arising out of and in the course of her employment on or about February 22, 1997.
- B. Whether the claimant sustained accidental injury arising out of and in the course of her employment in April of 1997.
- C. Whether the claimant provided timely notice of an alleged April 1997 accidental injury arising out of and in the course of her employment with the respondent.
- D. Whether the claimant's neck complaints arose out of and in the course of any injury which the claimant alleges with the respondent.
- E. Whether Judge Howard's Preliminary Award should be remanded to the Judge for further findings regarding the relationship between his orders and the two separate and distinct claims that have been made by the claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the record and considered the briefs of the parties, the Appeals Board finds as follows:

Docket No. 222,949

Docket No. 222,949 was assigned to an Application for Hearing filed May 13, 1997, alleging an accident occurred on February 22, 1997, that resulted in injury to claimant's right shoulder. The claimant's Application for Preliminary Hearing amended the accident date to include a series of accidents. At the July 8, 1997, preliminary hearing, counsel for claimant clarified that the series of accidents had a beginning date of February 22, 1997. No ending date was given. There was no amendment made to the alleged nature and extent of claimant's injury in Docket No. 222,949. Accordingly, this claim is found to be limited to the claimant's right shoulder only. Respondent stipulated to the compensability of the right shoulder injury. The Administrative Law Judge specifically noted that no defenses were raised to this docketed claim. Respondent did raise certain defenses to the alleged neck injury. However, that injury is the subject of Docket No. 222,950.

The request for temporary total disability compensation and for medical treatment appear to be related to the neck injury only. Therefore, the Appeals Board finds that the Amended Order should be considered as granting benefits only in Docket No. 222,950. However, as these cases were consolidated for preliminary hearing, they should remain consolidated for purposes of review.

Docket No. 222,950

In this docketed claim, claimant alleges a series of accidents beginning April 11, 1997, and continuing through April 28, 1997. Respondent denied that claimant met with accidental injury arising out of and in the course of her employment on the dates alleged and that timely notice was given.

Following the July 8, 1997, preliminary hearing before the Administrative Law Judge, claimant testified by deposition that same day. That deposition transcript and exhibits are a part of the preliminary hearing record.

Claimant has been working for Sunshine Biscuits and its successor, Keebler Biscuits, for 14 years. She underwent a cervical laminectomy by Frank P. Holladay, M.D., on July 2, 1997. Claimant related a specific on-the-job injury having occurred on February 22, 1997, when she was pulling boxes off the Cheez-It line and taking tins and stacking them on a table when they were full. Her job involved inspecting the vend Cheez-It line as the cases of product came down a conveyor. She would remove damaged product. On that occasion the machine was malfunctioning and there was quite a bit of damaged product which required removal. Claimant began noticing her arm getting sore.

She described the area of soreness as being in the shoulder area, and above the elbow. Claimant did not notice any pain in her neck at that time except when she was placed in an uncomfortable position for x-rays. Claimant received physical therapy which improved her condition. She was released to regular duty on or about April 1, 1997.

She returned to a job described as poly bagging that claimant stated was "a really bad job for your neck and shoulders" because it required her to work with her head down, repetitively moving her hands and arms back and forth.

After a day or two claimant was moved to the 202 line. It is to this return to regular duty work and, in particular the poly bagging job that claimant attributes the aggravation of her right shoulder and neck in Docket No. 222,950. On or about April 11, 1997, claimant received treatment from the plant paramedic for her shoulder and arm. She was given permission from her supervisor to see the plant paramedic. Thereafter claimant's right shoulder and upper arm continued to bother her off and on. She would take Tylenol or occasionally have the plant paramedic rub Ben Gay on her. During this period claimant's neck began to bother her. On April 28, 1997, she described her neck as going out on her. On that date claimant was lifting 25-pound boxes that she described as being bigger and bulkier than the typical 25-pound boxes used by the respondent. She reported her symptoms to a supervisor who in turn sent her to the plant paramedic. She was then referred to the company doctor. Claimant testified that when she went to occupational health on April 28, she reported having neck spasms and a lot of neck pain. She was given medication and continued working. Thereafter, the company paramedic would continue to apply Ben Gay to her arm and neck area. Claimant was given a light-duty restriction by the company physician at occupational health services on May 5, 1997, restricting claimant from lifting over 20 pounds and no pushing or pulling over 20 pounds. It was also recommended that she receive additional physical therapy. However, on May 6, 1997, claimant was informed that respondent was not going to provide any more treatment and that she should see her own doctor.

Claimant went to her personal physician, Michael Parra, M.D., who referred her to a neurosurgeon. On May 13 or 14 when claimant reported to work she was advised that there was no light-duty work available and she was sent home. Claimant was thereafter taken off work by Dr. Holladay because of cervical radiculopathy. Claimant eventually underwent surgery and has been unable to work since that surgery. Claimant has not worked since being sent home by the respondent on May 13 or 14, 1997. The parties have agreed that if this claim is found compensable, then claimant is entitled to temporary total disability compensation beginning May 15, 1997.

Respondent's dispute concerning the compensability of this claim seems to be premised upon the belief that claimant's February 1997 arm symptoms were actually the result of a cervical condition. Accordingly, since claimant allegedly did not report neck symptoms or injury until April, her neck condition is time-barred for failure to provide timely notice of accident. This argument is flawed because K.S.A. 44-520 requires claimant to

report accidents not injuries. Claimant reported her condition to respondent as best she understood it. It was not necessary for claimant to comprehend the extent to which her right-shoulder symptoms may have been the result of a cervical disc problem. Notice pursuant to K.S.A. 44-520 does not require an understanding of the etiology of claimant's symptoms. Claimant testified that she reported neck symptoms to her supervisor in February and again in April. Her work was understood to be the cause of those symptoms. Claimant also testified that the plant paramedic treated her neck symptoms with Ben Gay. Because she had to be sent to the paramedic by her supervisor each time, some form of notice must have been given to claimant's supervisor.

Claimant has alleged accident by a series of traumas through April 28, 1997. It is uncontroverted that respondent had notice of neck symptoms which claimant attributed to her work activities on that date. Therefore, timely notice of accident was given. Furthermore, at this stage of the proceeding, the record relates the onset of her neck symptoms to her work and to no other cause. The Appeals Board finds claimant has established that her neck injury was the result of an accident which arose out of and in the course of claimant's work for respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the July 28, 1997, Amended Order entered by Administrative Law Judge Steven J. Howard should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: David R. Hills, Lenexa, KS
Gary R. Terrill, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director